89-244

NO.....

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

ANTHONY PELLEGRINI,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

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QUESTIONS PRESENTED

1. Whether evidence seized in a search based on an unsigned warrant in violation of the Fourth and Fourteenth Amendments of the United States Constitution should be suppressed?

2. Whether evidence seized under an unsigned, facially deficient warrant can be admitted under the Leon "Good Faith" exception?

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OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court, Commonwealth v. Pelligrini, 405 Mass. 86 (1989). (Appendix A).

JURISDICTION

The decision of the Massachusetts Supreme Judicial Court was issued June 12, 1989. The jurisdiction of this Court to review the case on petition for writ of certiorari rests upon 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

United States Constitution

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment (portion)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 28, 1985 a complaint issued charging the defendant, Anthony Pellegrini, with possession of fireworks, M.G.L. ch. 148, section 39 and illegal storage of fireworks, M.G.L. ch. 148, section 40.

The defendant filed a motion to suppress evidence and an agreed statement of facts. The motion to suppress was denied on July 8, 1986.

On November 14, 1986 the matter was heard as a jury waived trial on the agreed statement of facts. The judge found the defendant guilty on both charges. On the charge of possession of fireworks, the court imposed a fine of $150.00. On the charge of illegal storage of fireworks, the court imposed a sentence of six months, suspended for one year. The sentences were stayed on appeal.

The defendant filed a notice of appeal to the Massachusetts Appeals Court. The Massachusetts Supreme Judicial Court took jurisdiction over the case on its own motion. On June

12, 1989, the Supreme Judicial Court issued an opinion affirming the judgment below.

STATEMENT OF FACTS

A four page statement of facts was agreed to by all parties for purposes of the motion to suppress. At trial an agreed statement of essentially the same facts was read into the record.

On June 28, 1988 Newton Police Officer Francis X. Fall applied to the Newton District Court for a search warrant. He submitted an affidavit which included a form affidavit and a two paged typed affidavit concerning probable cause. The parties did not dispute that the affidavit established probable cause. The District Court judge took Officer Fall's oath, witnessed officer Fall

sign the affidavit in two places and then signed the affidavit in two places attesting to the taking of Officer Fall's oath. The Judge folded the warrant, handed it to Officer Fall and said "you have a good warrant." The warrant was not signed by the judge due to inadvertence.

Officer Fall then went to the defendant's garage. He presented the warrant to Pellegrini who pointed out that the warrant was unsigned and therefore was not valid and could not be used to search the garage. Nevertheless, the police opened the garage door and seized thirty-six boxes. In the boxes were Class C explosives, including salutes, rockets, firecrakers, sparklers and shooting aerial balls.

Officer Fall returned to the Newton District Court and made a return of the warrant. After the return was made, the unsigned warrant was returned to the Judge who then signed the search warrant.

REASONS FOR GRANTING WRIT

1. This case involves important issues concerning the function of a search warrant and the necessity for a warrant to be signed. The Massachusetts Supreme Judicial Court decision conflicts with Supreme Court decisions on the importance of a warrant which properly informs a citizen that it has been validly issued.

2. The Massachusetts Supreme Judicial Court decision, while in accord with decisions in the Second Circuit Court of Appeals, Arizona,

California and Kansas conflicts with decisions of courts in Connecticut, Kentucky, Michigan, and Ohio.

3. This case involves the important issue of what constitutes a facially deficient warrant which cannot fall under the "good faith" exception of United States v. Leon.

ARGUMENT

I. THE EVIDENCE MUST BE SUPPRESSED BECAUSE IT WAS SEIZED WITHOUT A WARRANT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Massachusetts Supreme Judicial Court held that the failure of the judge to sign the warrant was a clerical error which did no effect the validity of the warrant. Commonwealth v. Pellegrini, 405 Mass.

86, 89 (1989). This was despite the fact that the court also stated that the accepted practice was for the person authorizing a search warrant to sign the warrant and for police officers and the public to rely on signed warrants. Pellegrini, at 91. The court relied on the decisions of a federal circuit and three states. United States v. Turner, 558 F.2d 46, 50 (2nd Cir. 1977); Yuma County Attorney v. McGuire 109 Ariz. 471, 472-473 (1973); People v. Superior Court (Robinson), 75 Cal.App.3rd 76, 79 (1977); Sternberg v. Superior Court, 41 Cal.App.3rd 281, 291-292 (1974); State v. Spaulding, 239 Kan. 439, 447 (1986). The court, however, noted that courts in four states had found that the failure to sign a warrant invalidates the warrant and

renders its issuance a nullity. State v. Surowiecki, 184 Conn. 95, 97 (1981); Byrd v. Commonwealth, 261 S.W.2d 437, 438 (Ky. App. 1953); People v. Hentkowski, 154 Mich. App.171, 177-178 (1986); State v. Spaw, 18 Ohio App.3d 77, 79 (1984)

The requirement that a warrant be signed is inherent in the Fourth Amendment. If the words "no warrants shall issue but upon probable cause" have any meaning, it must be that a warrant requires a signing - a physical act of issuance. The absence of a signature, like issuance by a non-qualified person, is not cured by the existence of probable cause. See Coolidge v. New Hampshire, 403 U.S. 433, 458-464 (1971). (Rejecting "the proposition that the existence of probable cause

renders noncompliance with the warrant procedure an irrelevance.")

The reasons for such a requirement are clear. The warrant requirement has the important function of informing the subject of the search or seizure of the "lawful limits of the inspector's power to search", Camara v. Municipal Court of the City and County of San Francisco, 287 U.S. 523, 532 (1967), that a neutral magistrate has reviewed and approved the search, Marshall v. Barlow's Inc., 436 U.S. 307, 323 (1978), and of his own "duty of submission." Commonwealth v. Taylor, 383 Mass. 272 (1981). See also, Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987); United States v. Hayes, 794 F.2d 1438 (9th Cir. 1986), cert. den. 107 S.Ct.

1289, reh. den. 107 S.Ct. 1984 (1987); United States v. Roche, 614 F.2d 6, 8 (1st Cir. 1980); In re Lafayette Academy, Inc., 610 F.2d 1, 4 (1st Cir. 1979); United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970), cert denied, 404 U.S. 947, (1971). An unsigned "warrant" cannot fulfill the informing function because the subject of the search has no way of knowing whether the officers have authority to search. They would have to accept the officer's "word" as to his authority and be left with the difficult task of having to determine at some time, however long, after the fact whether a neutral magistrate had indeed reviewed the application and approved of the warrant. This is one reason "the Fourth Amendment [does not]

countenance open-ended warrants, to be completed.....after the seizure has been carried out." Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325 (1979).

To hold that an unsigned "warrant" confers authority to search deprives citizens of much of the security guaranteed by the Fourth Amendment and Fourteen Amendment to the United States Constitution and opens a Pandora's box of possible harassment.

Although warrants with technical defects have been upheld, the requirement of the magistrate's signature is precisely what converts a piece of paper with its various attachments into a search warrant. Only then does it become an instrument with which police officers

enter a person's home and seize property. Without the magistrate's signature, the person whose home or other protected space is being searched has no assurance that a neutral or disinterested party has reviewed the application submitted by the officer, has read the affidavit filed in support of the application and has found probable cause to justify governmental intrusion.

The decision of the Massachusetts Supreme Judicial Court is in conflict with decisions in a number of jurisdictions which have held that the absence of the issuing magistrate's signature on a search warrant is more than a technical violation and makes the search warrant void or a nullity. State v. Surowiecki, 184 Conn. 95, 97 (1981)

(although judge intended to sign warrant, failure to do so invalidated the warrant); Byrd v. Commonwealth, 261 S.W.2d 437, 438 (Ky. App. 1953) (where the judge did not sign the warrant, it was void even though the name of the judge was signed by his secretary at his request and in his presence); People v. Hentkowski, 154 Mich. App. 171, 177-178 (1986) (search and seizure made pursuant to warrant not signed by magistrate was unconstitutional, even though failure to sign was merely inadvertent); State v. Spaw, 18 Ohio App.3d 77, 79 (1984) (a document issued without the signature of either the "judge" or the "clerk" was clearly invalid and failed to constitute a search warrant ab initio).

II. THE LEON "GOOD FAITH" EXCEPTION CANNOT PERMIT INTRODUCTION OF THE ILLEGALLY SEIZED EVIDENCE.

1. The "Good Faith" Exception is Not Applicable to Warrantless Searches.

Should the court examine the instant case in light of United States v. Leon, 468 U.S. 897 (1985), the evidence seized would still have to be suppressed.

As noted by many of the courts that have examined the efficacy of unsigned warrants, an actual warrant has not issued in such a case and the search and seizure must be examined as a warrantless search and seizure.

In Commonwealth v. Chandler, 505 Pa. at 123-124, the court held that "[i]t [was] not enough, that the Commonwealth presented [a judge] with

sufficient facts to justify a finding of probable cause" to uphold an unsigned search warrant, because the "record does not show that he rendered a judicial determination on that issue." The Chandler court noted that it would be "specious" to view the unsigned warrant as a "defective" warrant, "because no warrant, in fact, exists. The District Justice's record shows it never issued." Id. at 125.

The Ohio court in State v. Spaw, supra, in holding an unsigned warrant to be facially invalid stated that "what otherwise purports to be a search warrant is not a search warrant when it lacks any signature at all."

Other courts examining warrantless searches have

specifically held that the Leon "good faith" exception does not apply. United States v. Whiting, 781 F.2d 692 (9th Cir. 1986); United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984), cert. denied, -- U.S. --, 105 S.Ct. 2126 (1985). See also, United States v. Owens, 782 F.2d 146 (10th Cir. 1986); United States v. Milian-Rodriquez, 759 F.2d 1558 (11th Cir. 1985), cert. denied, -- U.S. --, 106 S.Ct. 135 (1986); Greenhaugh, The Warrantless Good Faith Exception: Unprecedented, Indefensible and Devoid of Necessity, 26 So. Tex. L.J 129 (1985).

2. The "Good Faith" Exception Does Not Apply to Facially Deficient Warrants.

Even if this court were to consider the evidence in this case as

seized pursuant to a warrant, Leon, would still not permit the introduction of the evidence.

This court in Leon indicated that there are cases in which suppression is the proper remedy when a seizure has been effected. "[I]t is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." Leon, 468 U.S. at 3420. The court then listed several circumstances where this would be the case. At the end of the list the court stated that "depending on the circumstances of the particular case, a warrant may be so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers

cannot reasonably presume it to be valid." Leon, 468 at 3421. (Emphasis added).

Because the warrant in the case at bar did not contain a magistrate's signature, it was so "facially deficient" that the executing officers could not in good faith have reasonably presumed it to be valid. State v. Spaw, 18 Ohio App.3d 77 (1984); Miller v. Texas, 703 S.E.2d 352 (Tex.App. 1985). In specifically addressing Leon, the Spaw court states that:

> In our opinion, what otherwise purports to be a search warrant is not a search warrant when it lacks any signature at all and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable but did not exist as a warrant and was void ab initio. Moreover, with such defect being readily apparent on the face of the instrument it

> cannot be said that the officers exercising the "warrant" acted in good faith.

Miller also states that the trial court in that case "erred in applying the 'good faith exception' to the exclusionary rule . . . the warrant in Leon was a facially valid search warrant unlike the warrant in the case before us." Miller, 703 S.W. 2d at 354.

3. The "Good Faith" Exception Does Not Apply When the Police Officer Knows The Warrant Is Unsigned.

The exclusion based on facial deficiency is particularly compelling in the instant case where before the search, "Pellegrini called to Officer Fall's attention the fact that the search warrant was unsigned ... and was not valid...." The Newton

officers cannot be said to have acted in good faith in choosing to execute the alleged warrant, after hearing defendant's pre-search objections.

Such an analysis of Leon is supported by this court's own reasoning concerning the necessity of the exclusionary rule. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." Leon, supra, 468 U.S. at 916.

Although the judge's error in failing to sign the warrant was inadvertent, this judicial error was compounded by the subsequent intentional misconduct of the police in conducting a search where they had prior knowledge of the judge's failure to sign the warrant,

knowledge that was provided to them by the defendant. "Evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 919, quoting United States v. Peltier, 422 U.S. 531, 542 (1975). In Leon, this Court noted that "[t]he objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits," knowledge that is provided by "police training programs that make officers aware of the limits imposed by the [F]ourth Amendment...." Id. at 919, n.20.

In conducting a search using a warrant which they knew was facially

invalid, Officer Fall and the other Newton officers at the scene "engaged in willful, or at the very least negligent, conduct which has deprived the defendant of [his] right[s]." Leon, supra at 919, quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974). Consistent with the findings in Leon and with the purpose of the exclusionary rule, i.e. -- the deterrence of police misconduct -- this Court should not admit evidence obtained as a result of such misconduct, in order to "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused." Id. The Court in its use of the "good faith exception" to the exclusionary rule, "should not

encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality." Leon at 919 n.20. Finally, in the instant case the police officer could have rectified the error instead of going ahead with a search he knew to be pursuant to an unsigned warrant. Not only were Officer Fall and an Assistant District Attorney present at the defendant's garage prior to the search, but at least four other Newton Police Officers were also at the scene. To remedy the unsigned warrant prior to the search, one of the Newton Officers could easily have returned to the nearby courthouse to obtain the judge's signature, while

the other four officers secured the defendant's premises until the valid warrant was obtained.

CONCLUSION

For the above stated reasons the petitioner requests that this application for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court
for the Commonwealth,

At Boston, June 12, 1989

In the Case No. SJC- 4888

COMMONWEALTH

vs.

ANTHONY PELLEGRINI

pending in the District Court Department
of the Trial Court for the County of
Middlesex, Cambridge Division
No. JR-85-CR-1247N
No. JR-85-CR-1247N-a

ORDERED, that the following entry be made
in the docket; viz., --

Judgments affirmed.

By the Court,

/s/ Jean M. Kennett, Clerk

June 12, 1989

COMMONWEALTH v. ANTHONY PELLEGRINI

Middlesex, February 7, 1989-June 12, 1989

Present: Wilkins, Liacos, Abrams, Nolan, Lynch, JJ.

Defendant was convicted in the District Court, Middlesex County, Robert H. Bohn, Jr., and Neal J. Walker, JJ., and his motion to suppress was denied. He appealed. The Supreme Judicial Court, Abrams, J., held that inadvertent failure of judge to sign search warrant is no more than "clerical error" that does not nullify warrant, where judge intended to issue warrant and judge signed officer's affidavit.

Affirmed.

Liacos, J., filed dissenting opinion.

Jamie Ann Sabino for the defendant.

Edward D. Rapacki, Assistant District Attorney, for the Commonwealth.

ABRAMS, Justice.

The defendant appeals from his convictions for possession of fireworks and illegal storage of fireworks, G.L. c. 148. §§ 39, 40. The sole question on appeal is whether the motion judge erred in denying the defendant's motion to suppress evidence which was seized pursuant to a warrant the issuing judge intended to sign but, in fact, failed to sign. We transferred the case to this court on our own motion. We affirm the convictions.

The facts are not in dispute.[1] On June 28, 1985, police officer Francis X. Fall

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1. On April 29, 1986, the Commonwealth and the defendant filed an "agreed statement of facts filed in lieu of hearing on defendant's motion to suppress evidence." At trial, a statement of essentially the same agreed facts was read into the record.

applied to the Newton District Court for a warrant authorizing the search of a garage at 19 Dunstan Street in Newton. A District Court judge reviewed Officer Fall's affidavit in support of the application for a search warrant.[2]

Fall's affidavit consisted of two parts: a form affidavit with the particulars filled in by Fall, and a two-page, typed

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2. Fall attested to the following facts to establish probable cause. He saw the defendant and Dominic Bianchi, Jr., loading into a truck boxes from the garage at 19 Dunstan Street. Both men were known to deal in fireworks. Fall telephoned the canine division/bomb squad of the police department. That division sent an experienced officer, along with a dog trained to detect explosive odors. Other officers arrived at the garage before Fall did. These other officers saw numerous boxes labeled with an orange sticker which is known to warn of explosives. The defendant told the officers that they were fireworks, and said that he had no license for them. Further, the trained dog acted in such a manner as to indicate that there were explosives in the garage.

affidavit containing Fall's testimony concerning probable cause. The form affidavit incorporated the typewritten affidavit by reference. In the presence of the judge, Fall signed both documents. The judge signed both documents, attesting that the officer swore to the truth of their contents in front of the judge. The judge then handed Fall the warrant authorizing the search, and said, "You have a good warrant." At this point, the judge intended that the warrant issue but he failed to sign the warrant.

The judge retained the signed affidavits. See G.L. c. 276 § 2B (1986 ed.). Fall took the warrant and went to the garage at 19 Dunstan Street with an assistant district attorney. He presented the warrant to the defendant. The defendant told Fall that the warrant was

not signed. Fall told the defendant that he knew the warrant was good; he had just come from the judge, who assured him that he had a "good warrant." Fall told the defendant the name of the judge. Despite an objection from the defendant, Newton police officers entered and searched the garage. The officers found and seized thirty-six boxes of class C explosives. Afterward, Fall went back to the District Court and returned the warrant. The unsigned warrant was then returned to the judge, who signed it.

The defendant does not dispute the fact that the affidavit established probable cause to search the garage and that there were no defects in the warrant as to the description of items, the description of the place to be searched, and the execution of the warrant. The defendant does argue that the judge's failure to

sign the warrant rendered the warrant a nullity and that therefore the search was a warrantless search not justified by exigent circumstances. The Commonwealth argues that the inadvertent failure of the judge to sign the warrant was a ministerial error which did not nullify the warrant. We agree with the Commonwealth.

Ministerial errors do not nullify search warrants. See, e.g., Commonwealth v. Truax, 397 Mass. 174, 181-182, 490 N.E.2d 425 (1986) (inadvertent deletion of the words "there is probable cause" from the warrant). Commonwealth v. Wilbur, 353 Mass. 376,381,231 N.E.2d 919 (1967), cert. denied, 390 U.S. 1010, 88 S.Ct. 1260, 20 L.Ed.2d 161 (1968)(absence of the teste of the first justice of the court); Commonwealth v. Chamberlin, 22

Mass.App.Ct. 946, 949,494 N.E.2d 63 (1986) (failure to place name of affiant in the proper space on his affidavit beneath the affiant's signature). Commonwealth v. Young, 6 Mass.App.Ct. 953, 382 N.E.2d 515 (1978) (failure of police officer to sign affidavit). Commonwealth v. Hanscom, 2 Mass.App.Ct. 840, 311 N.E.2d 95 (1974) (omission of affiant's name and date in the acknowledgement of the affidavit). Further, we said that the failure of a clerk of court to sign a civil writ, as required by the State Constitution, was a defect of form capable of amendment. See Austin v. Lamar Fire Ins. Co., 108 Mass. 338,340 (1871).

These cases indicate that a failure to sign an otherwise valid warrant, in a situation where there is no question that the judge intends to issue a warrant,

should be deemed a ministerial defect which does not invalidate the warrant. Some courts have so held. See, e.g., United States v. Turner, 558 F.2d 46,50 (2d Cir.1977); Yuma County Attorney v. McGuire, 109 Ariz. 471, 472-473, 512 P.2d 14(1973); People v. Sanchez, 131 Cal.App.3d 323, 329, 182 Cal. Rptr. 430 (1982); People v. Superior Court, 75 Cal.App.3d 76, 79, 141 Cal.Rptr. 917 (1977);[3] Sternberg v. Superior Court, 41

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3. In People v. Superior Court, supra, the court emphasized that the police officer did not realize that the warrant was unsigned before executing the search. Therefore, the unsigned warrant did not conflict with "[a] secondary purpose" of the law: "appris[ing] the householder that the search had been authorized by a magistrate." Id. 75 Cal.App.3d at 80, 141 Cal.Rptr. 917. In the case before us, the defendant and the officers noticed before the search that the warrant was unsigned. However, the court in People v. Superior Court, supra, was analyzing the policies underlying not only the Fourth Amendment but also "the California statutes which prescribe the

Cal.App.3d 281, 291-292, 115 Cal.Rptr. 893 (1974); State v. Spaulding, 239 Kan. 439, 447, 720 P.2d 1047 (1986). Other courts hold that failure to sign a warrant invalidates the warrant and renders its issuance a nullity. See, e.g., State v. Surowiecki, 184 Conn. 95, 97, 440 A.2d 798 (1981); Byrd v. Commonwealth, 261 S.W.2d 437, 438 (Ky.1953); People v. Hentkowski, 154 Mich.App. 171, 177-178, 397 N.W.2d 255 (1986); State v. Spaw, 18 Ohio App.3d 77,

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methods of the issuance of search warrants." Id. 75 Cal.App.3d at 80, 141 Cal.Rptr.917. California statutes explicitly provide that a warrant must be "signed by a magistrate" (emphasis added). Id. 75 Cal.App.3d at 79,141 Cal.Rptr.917. Massachusetts has no analogous language in its search warrant statute. See G.L.c.276, §1 et seq. (1986 ed.). At least in this case, where Fall told the defendant the name of the judge who had authorized the search before he entered the premises, no substantial rights of the defendant have been affected by the lack of signature on the warrant at the time of the search.

79, 480 N.E.2d 1138 (1984).[4] We conclude that, where, as here, there is no dispute that the judge intended to issue the warrant, and the judge signed the officer's affidavit, the failure to sign the warrant "is no more than a clerical error." Commonwealth v. Truax, supra 397 Mass. at 182, 490 N.E.2d 425.[5]

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4. Courts of some jurisdictions with State statutes which explicitly provide that warrants must be signed have concluded that a signature is necessary for the warrant to be valid. See State v. Surowiecki, supra 184 Conn. at 100, 440 A.2d 798 (Shea, J., dissenting), and cases cited.

5. The dissent states that the cases from other jurisdictions do not support the conclusion we reach. See post at 517 n. 1. The dissent fails to recognize that these cases conclude, as we do, that an unsigned warrant is not always invalid. Two of these cases, on Federal and one from California, deal with telephonic warrants. The Federal decision is based on the principle that the signing of the warrant is a "purely ministerial task." United States v. Turner, supra. The California case relies on older cases for the proposition that "the inadvertent absence of a magistrate's signature on the

The Fourth Amendment to the United States Constitution requires that "no warrant shall issue, but upon probable cause, supported be oath or affirmation, and particularly describing the place to be searched and the things to be seized." The defendant does not dispute that the judge intended to issue the warrant, that there was probable cause to support the warrant, and that the warrant described the place to be searched and the items to be seized with sufficient particularity.

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traditional warrant... does not invalidate the warrant." People v. Sanchez, supra. A candid examination of the other three cases discussed by the dissent demonstrates that the cases, in fact, support our conclusion. The attempted distinctions are not persuasive. See, e.g. Yuma County Attorney v. McGuire, supra, citing Commonwealth v. Wilbur, 353 Mass. 376, 231 N.E.2d 919 (1967). People v. Superior Court, supra 75 Cal.App.3d at 79, 141 Cal.Rptr. 917. State v. Spaulding, supra.

There is no Federal requirement either under the Fourth Amendment or case law from the United States Supreme Court which requires that a judge sign the actual warrant. Where, as here, the judge's name as the official who took the affiant's oath appears on the affidavit on which the warrant is based, where the judge said to the officer, "[You have] a good warrant," and where all the other Federal requirements are met, we think the warrant is valid as a matter of Federal law. "As long as the [judge] in fact performs the substantive tasks of determining probable cause and authorizing the issuance of the warrant, the [Fourth A]mendment is satisfied." United States v. Turner, supra at 50.

Although the State Constitution and Massachusetts statutory law provide that

the warrant must issue, neither one explicitly provides that the warrant must be signed. See art. 14 of the Massachusetts Declaration of Rights; G.L. c. 276, §§1-2B (1986 ed.). Despite this fact, and despite the plain meaning of the word "issue," the dissent asserts that "the judge could not 'issue' the search warrant until he signed the document." Post at 518. This conclusory proposition has no basis in the language of the State Constitution or statutes. The words "issue" and "sign" are not synonymous. If the Legislature wished to make the signing of warrants a requirement without any exception, it could have done so explicitly.

We recognize that the accepted practice is for persons authorizing search warrants to sign the warrants and for police

officers and the public to rely on signed warrants. The signature of the authorizing official affords the householder notice that there was official authorization for the warrant. The signature makes the person whose premises are to be searched aware that he or she may have a judicial remedy if police abuse the warrant's dictates. It also impresses on the persons authorizing the search the seriousness of what is being ordered. For these reasons, as a general rule, warrants must be signed by the authorizing authority.

Nevertheless, here the judge signed the affidavit supporting the warrant, and told the police officer that he had "a

good warrant."[6] Before executing the search, the police officer told the defendant the name of the judge who authorized the warrant. Further, the police did not exceed the authority of the warrant in any respect in its execution or return. In these narrow circumstances, where there is no dispute the judge intended the warrant to issue when he handed it to Fall, the defendant's motion

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6. The dissent correctly notes that we have not adopted under State law the "good faith" doctrine of United States v. Leon, 468 U.S. 897,906-907, 104 S.Ct. 3405,3411, 82 L.Ed.2d 677 (1984). See Commonwealth v. Treadwell, 402 Mass. 355, 356 n. 3, 522 N.E.2d 943 (1988). We do not do so in this case. The Federal good faith doctrine concerns only the propriety of excluding evidence obtained "pursuant to a subsequently invalidated warrant." United States v. Leon, supra 468 U.S. at 918, 104 S.Ct. at 3418. The Leon case assumes a violation of the Fourth Amendment. Because we rule that the warrant in question was valid, there is no basis for discussing the exclusionary rule or any Federal exception to the exclusionary rule.

to suppress properly was denied.

Judgments affirmed.

LIACOS, Justice (dissenting).

The court today rules ante at 515, that a search warrant, which a judge inadvertently failed to sign, is valid because the absence of the judge's signature "should be deemed a ministerial defect which does not invalidate the warrant."[7] I dissent.

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7. The court cites six cases to support the proposition that an otherwise valid search warrant is not invalidated by the lack of a judge's signature. Ante at 515. The court fails to point out that two of those cases involve telephonic search warrant statutes which explicitly allow telephonic search warrant judicial approval and provide other safeguards against unreasonable searches and seizures. See United States v. Turner, 558, F.2d 46 (2d Cir.1977); People v. Sanchez, 131 Cal.App.3d 323, 329, 182 Cal. Rptr. 430 (1982). In another case, Yuma County Attorney v. McGuire, 109 Ariz. 471, 512 P.2d 14 (1973), the court assesses the validity of an unsigned search warrant in light of the fact that the State legislature has authorized the use of telephonic search warrants.

A search warrant, unsigned by a judge, is a nullity, void on its face, and void ab initio. Kelley v. State, 55 Ala. App. 402, 403, 316 So.2d 233 (1975). State v. Vuin, 185 N.E.2d 506, 516 (Ohio Ct.C.P.1962). See State v. Span, 18 Ohio App. 3d 77, 79, 480 N.E.2d 1138 (1984).

In People v. Superior Court, 75 Cal.App.3d. 76, 80, 141 Cal.Rptr. 917 (1977), another case cited by the court, the affiant testified that the judge signed numerous duplicate copies of the search warrant, but not the original. No such allegation is made here. Furthermore, that court specifically ruled that the unsigned warrant was not invalid because no confrontation occurred between the householder and the police officer executing the warrant.

Also cited by the court is State v. Spaulding, 239 Kan. 439, 720 P.2d 1047 (1986). Kansas has a statute stating that evidence shall not be suppressed because of technical irregularities in a search warrant. Neither the Massachusetts statutory scheme nor art. 14 of our Declaration of Rights has a similar provision. See G.L.c. 276, §1 et seq. (1986 ed.).

In my view, none of these cases supports the court's ruling.

Such a warrant is invalid because "it shows on its face that it lacks the signature of any [judge or] magistrate, such being the only authorized officer to put life in the paper." Kelley v. State, supra 55 Ala.App. at 404, 316 So. 2d 233.

Article 14 of the Massachusetts Declaration of Rights states that "no warrant ought to be issued but in cases, and with the formalities prescribed by the laws" (emphasis added). Similarly, G.L. c. 276, § 1, commands an authorized court or justice to "issue a warrant" if satisfied that there is probable cause to do so (emphasis added). G.L. c. 276, § 1 (1986 ed.). A judge or magistrate "issues" a warrant only when he or she signs the appropriate document and entrusts it to the proper person. People v. Hentkowski, 154 Mich.App. 171, 177, 397 N.W.2d 255 (1986). Although the parties

here have stipulated that the judge intended to sign the warrant but failed to do so by inadvertence, I conclude that the judge could not "issue" the search warrant until he signed the document. "[A] lawful signature on the search warrant by the person authorized to issue it [is] essential to its issuance." State v. Surowiecki, 184 Conn. 95, 97, 440 A.2d 798 (1981) (citing various authorities for the proposition). See People v. Hentkowski, supra 154 Mich.App. at 177, 397 N.W.2d 255 (judge inadvertently failed to sign warrant).

It has been stated that "[c]ourts never regard lightly the extraordinary and unusual procedure authorized by search warrants and are ever mindful of the constitutional guarantee to citizens to be free from unreasonable search and

seizure." State v. Cochrane, 84 S.D. 527, 530, 173 N.W. 2d 495 (1970), quoting Byrd v. Commonwealth, 261 S.W.2d 437, 438 (Ky.1953). "[S]tatutes authorizing and regulating searches and seizures and the issuance of search warrants are strictly construed against the state and liberally in favor of the individual." State v. Cochrane, supra 84 S.D. at 531, 173 N.W.2d 495.

The signature requirement is supported by policy considerations concerning three sets of actors -- judges, police officers, and the public. A judge's signature on a search warrant serves as an "identifiable objective manifestation" of the judge's subjective intent to issue a search warrant. State v. Surowiecki, supra 184 Conn. at 97, 440 A.2d 798. The signature requirement impresses upon a judge the

seriousness and importance of issuing a search warrant. People v Hentkowski, supra 154 Mich.App. at 178, 397 N.W.2d 255.

Furthermore, the potential for abuse and police misconduct in allowing unsigned warrants is clear. Id. Because officers who execute a search warrant must limit their search to the dictates of a warrant, they must first review the document. Id. Police officers cannot reasonably rely upon an unsigned document as authority to conduct a search. Id. at 178-179, 397 N.W.2d 255. State v. Spaw, 18 Ohio App.3d 77, 79, 480 N.E.2d 1138 (1984). The signature requirement is not overly burdensome to police officers who can take corrective measures and thereafter conduct the search. People v. Hentkowski, supra 154 Mich.App. at 178, 397 N.W.2d 255.

Lastly, the signature requirement protects and assures persons in control of property which is to be searched. When such persons are presented with a document which purports to be a search warrant, they must be able to review the document and determine whether to allow the search. "The custodian should not have to guess as to whether a magistrate intended ... to sign the document which is presented to the custodian." Id. at 179, 397 N.W. 2d 255. See People v. Superior Court, 75 Cal.App.3d 76, 80, 141 Cal.Rptr. 917 (1977) (stating that secondary purpose of each warrant is to apprise householder that search has been authorized by magistrate.)

There is no allegation in this case of wrongdoing either on the part of the

police officer or the judge; this was, simply a case of inadvertence. There was, however, a confrontation between the defendant and the officer executing the search warrant that illustrates one of the deficiencies of an unsigned search warrant. The defendant called to the officer's attention the fact that the search warrant was not signed and therefore was not valid to search the garage. The officer told the defendant that he knew the warrant was a good warrant and that he just came from the judge who had told him that he had a good warrant.[8] The defendant advised the

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8. I am not comforted by the fact that the judge told the police officer in this case that he had a good warrant. This court has not yet ruled on the relevance of an officer's subjective "good faith" intent. See Commonwealth v. Sheppard, 381, 391-393, 476 N.E.2d 541 (1985); United States v. Leon, 468 U.S. 897, 906-907, 104 S.Ct. 3405, 3411, 82

officer that the police could not enter the premises with an unsigned warrant and that if they did, the defendant would sue. Nevertheless, the officers proceeded to search the premises. The court glosses over this confrontation and simply states that "no substantial rights of the defendant have been affected by the lack of signature on the warrant at the time of the search" because the officer told the defendant the name of the judge who authorized the search. Ante at 516 n. 3. I disagree. A property owner has the right, under art. 14, to obtain the protection of a warrant signed by a judge.

L.Ed.2d 677 (1984). In Leon, the good faith exception was applied where the warrant was facially valid. This is not so here. I note also that two courts have held the "good faith" exception to the exclusionary rule cannot apply to an unsigned search warrant because the defect is readily apparent.

I would invalidate the defective search warrant and would suppress the evidence.

(2)

NO. 89-244

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UNITED STATES

October Term 1989

ANTHONY PELLEGRINI,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence seized pursuant to a warrant which the judge intended to issue but inadvertently failed to sign?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Commonwealth of Massachusetts respectfully requests that this Court deny the petition for writ of certiorari.

OPINION BELOW

Respondent is satisfied with petitioner's citation to the opinion below.

STATEMENT OF THE CASE

Respondent relies on the facts set forth in Commonwealth v. Pellegrini, 405 Mass. 86, 539 N.E.2d 514 (1989).

REASONS FOR DENYING THE WRIT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

A. The Matter Is Controlled By Prior Decisions Of This Court.

Petitioner claims that the judge's inadvertent failure to sign the search warrant rendered the warrant a nullity and that therefore the search was a warrantless one in violation of the Fourth Amendment of the United States Constitution. Petitioner, however, does

not dispute that the affidavits in support of the search warrant established probable cause and were reviewed and signed by the judge, attesting that the officer swore the truth of their contents before the judge. Further, petitioner does not dispute that the judge intended to issue the warrant, telling the police officer he had "a good warrant." Nor does petitioner contend that there were any defects in the warrant as to the particularity of items and the place to be searched or in the execution of the warrant. Finally, it is uncontested that before the search the police officer told the defendant the name of the issuing judge when the defendant called to his attention the fact that the warrant was not signed. Commonwealth v. Pellegrini, 405 Mass. 86 at 86-88, 539 N.E.2d 514 (1989).

There is no substantial question presented because previous decisions of this Court, United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), are dispositive of petitioner's claim.

In Leon and Sheppard, this Court held that even if an error of constitutional dimensions may have been committed with respect to the issuance of search warrants,[1/] where a neutral and detached magistrate, not the police officers, made the mistake, the evidence will not be suppressed if the police officers acted in objectively reasonable reliance on the warrant. Sheppard, 468 U.S. at 987-988, 990 (1984); Leon, 468 U.S. 897 (1984). In Sheppard, a detective investigating a murder

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1/ Here, the error did not rise to the level of a violation of state or federal constitutional law. See infra.

case prepared and presented to the judge an affidavit for the search of the defendant's house as well as a "form warrant" for controlled substances which the detective had attempted to alter to conform to the affidavit. Sheppard, 468 U.S. at 985-986. In his review of the warrant, the judge failed to change the substantive portion on the "form warrant" which authorized a search for controlled substances only. He also failed to alter the form so that it incorporated the affidavit. Id. The judge signed the warrant, gave it to the detective, and informed him that the warrant was sufficient authority in form and content to carry out the search requested. Id. at 986. The search was executed in conformity with the description of the items sought in the affidavit. Id. The judge's error was not in concluding that the warrant should issue, but in failing

to make the necessary changes on the form. Id. at 990 n.7. This Court held that the officers had a reasonable basis for believing that the search was authorized by a valid warrant as they had taken "every step that could reasonably be expected of them." Id. at 989. What was said in Sheppard applies with equal force in the instant case:

> In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." Illinois v. Gates, 462 U.S. 213, 263 (1983) (White, J., concurring in judgment). Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Accordingly, federal law does not require the exclusion of the disputed evidence in this case.

Id. at 990-991. See also Leon, 468 U.S. at 921-922. (It is the magistrate's responsibility to determine probable cause and, if he so finds, "to issue a warrant comporting in form with the requirements of the Fourth Amendment"; an "officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient"). (emphasis added) Petitioner claims that Leon and Sheppard do not control this case. It is true that in Leon, the court stated the general proposition that, "depending on the circumstances of the particular case, a warrant may be so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be

valid. Cf. Massachusetts v. Sheppard, post, at 988-991." Leon, 468 U.S. at 923. However, as is clear, the Court is explicit in distinguishing the circumstances in Sheppard from this general proposition. In fact, a virtually identical claim of "facial deficiency" was made and summarily rejected in Sheppard:

> [T]hat argument is based on the premise that O'Malley had a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made . . . . [W]e refuse to hold that an officer is required to disbelieve a judge who has just advised him, by word and action, that the warrant he possesses authorizes him to conduct the search he has requested.

Sheppard, 468 U.S. at 989-990.

If the facial defects on the warrant in Sheppard did not preclude an officer from reasonably presuming the warrant valid, then a fortiori the inadvertent failure of the judge to sign the warrant

where he intended to issue the warrant, had signed the affidavits, properly determined there was probable cause, and told the officer he had a good warrant, should not.

B. The Inadvertent Failure Of The Judge To Sign The Search Warrant Is Not An Error Of Federal Constitutional Dimension.

As succintly stated by the Supreme Judicial Court in its opinion below:

> The Fourth Amendment to the United States Constitution requires that "no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the things to be seized." The defendant does not dispute that the judge intended to issue the warrant, that there was probable cause to support the warrant, and that the warrant described the place to be searched and the items to be seized with sufficient particularity. There is no Federal requirement either under the Fourth Amendment or case law from the United States Supreme Court which requires that a judge sign the actual warrant. Where, as here, the judge's name as the official who took the affiant's oath appears on the affidavit on which the warrant is based, where the judge said to the officer, "[You have] a

> good warrant," and where all the other Federal requirements are met, we think the warrant is valid as a matter of Federal law. "As long as the [judge] in fact performs the substantive tasks of determining probable cause and authorizing the issuance of the warrant, the [Fourth A]mendment is satisfied." United States v. Turner, supra at 50.

Commonwealth v. Pellegrini, 405 Mass. at 89-90.

This is consistent with what is implicit in Leon and Sheppard, viz., that the essential element in the issuance of a warrant is the determination of probable cause by a neutral and detached magistrate, not the judge's signature or the form of the warrant. This actual determination of probable cause is the "reliable safeguard" for assuring compliance with the Fourth Amendment. Leon, 468 U.S. at 913.

The cases relied on by petitioner in his attempt to demonstrate a conflict in federal constitutional law between the

decision below and the decisions of other state appellate courts do not in fact rest on federal constitutional grounds. Three of the cases rely on a strict construction of the particular state constitution, state statutes or state rules of criminal procedure as to whether a requirement that a warrant "issue" means that the warrant must be signed. See, State v. Surowiecki, 184 Conn. 95, 440 A.2d 798, 799-800 (1981) (the word "issue" in the state statute held to require magistrate's signature as a matter of statutory construction; no claim or reliance upon state or federal constitutional provisions); State v. Spaw, 18 Ohio App. 3d 77, 480 N.E.2d 1138, 1140-1141 (1984) (state rule of criminal procedure requiring warrant to "issue" held to require signature of either judge or clerk as a matter of state statutory construction). One of

the cases cited by petitioner, People v. Hentkowski, 154 Mich. App. 171, 397 N.W.2d 255, 258 n.1 (1986) (the word "issue" in the state constitution construed to mean warrant must be signed as a matter of state constitutional law), has, arguably, been undermined by the Michigan Supreme Court in People v. Mitchell, 428 Mich. 364, 408 N.W.2d 798, 800-801 (1987) (although as a matter of state constitutional law a search warrant based on an unsigned affidavit will be presumed to be invalid, the presumption may be rebutted by a showing that the facts in the affidavit were presented under oath to the magistrate). The only other case cited by petitioner, Byrd v. Commonwealth, 261 S.W.2d 437, 438 (Ky. 1953), is wholly inapposite to this case. There, the court held that a judge's delegation of his authority to a private individual, his secretary, to

sign the judge's name to a warrant was precluded by the state constitution and the Fourth Amendment.

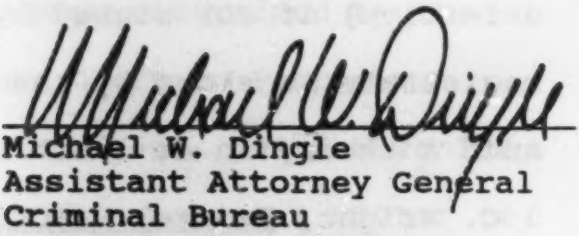
Finally, the lack of substantiality of petitioner's claim that a "warrant" is not a "warrant" (and is constitutionally defective) if not signed by the issuing magistrate is shown by the rejection of such a theory in at least two treatises, 3 C. Wright, Federal Practice & Procedure §670.1 (2d ed. 1982); W. LaFave, Search and Seizure §4.3(c) pp. 174-177 (1987). These treatises also note that oral warrants are authorized by Fed. R. Crim. P. 41(c)(2) which allows a magistrate, if satisfied oral testimony is sufficient to find probable cause, to order the issuance of the warrant by directing the person requesting the warrant to sign the magistrate's name on the duplicate original warrant.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES M. SHANNON
Attorney General



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